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In the Supreme Court of the United States

OCTOBER TERM 1976

No. 76-1507

AUSBERT S. SANDOVAL,
Petitioner,

VS.

THE INDUSTRIAL COMMISSION OF ARIZONA: and
SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT & POWER DISTRICT,
Respondents.

**Response of Salt River Project
Agricultural Improvement & Power District
to Petition for a Writ of Certiorari**

JOHN S. SCHAPER
215 East Lexington Avenue
Phoenix, Arizona 85012
*Attorney for Respondent,
Salt River Project
Agricultural Improvement
& Power District*

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INTRODUCTION

I. References and Abbreviations.

The following abbreviations and designations will appear in this brief:

"Pet." will be used to refer to the Petition for a Writ of Certiorari.

The Petitioner, Ausbert S. Sandoval, will generally be mentioned by name, or designated as the Petitioner.

The Industrial Commission of Arizona will be referred to as "the Commission."

This Respondent, which is correctly known as the Salt River Project Agricultural Improvement & Power District, will be referred to as the "Salt River Project."

Those portions of the Arizona Revised Statutes which are pertinent to this case will be designated by "A.R.S."

References to the opinion of Division One of the Court of Appeals of the State of Arizona (Pet. A-5) will indicate the pages of the reported text appearing in 559 P.2d, commencing at 688.

II. The Format of the Respondent's Brief.

The Petition for a Writ of Certiorari is littered with irrelevancies and distortions of the legal and factual background of this matter. Further, the Petitioner's definition of the Questions Presented (Pet. 3-4) and the Statement of the Case (Pet. 5 et seq.) provide no objective understanding of any real controversy which might be resolved by the Court.

In order to cope with these deficiencies, and to facilitate a speedy disposition of the Petition, this brief will include a restatement of the Questions Presented, and a complete Statement of the Case. And, because this matter involves a complex and unique system for the administration and adjudication of claims for workmen's compensation benefits in the State of Arizona, the Statement of the Case in this brief will include a summary of the pertinent provisions of the Arizona Workmen's Compensation Law, as well as an explanation of what has transpired in the processing of the workmen's compensation claim of the Petitioner.

QUESTIONS PRESENTED

It has consistently been the contention of the Respondent, Salt River Project, that the Petitioner failed to properly raise any question relating to Due Process at the hearings initially held before the Commission; and that the Petitioner could not properly raise any questions concerning the constitutionality of the Arizona Workmen's Compensation Law for the first time before the Arizona Court of Appeals. However, the Arizona Court of Appeals undertook consideration of a single question involving the Fourteenth Amendment:

"Was the petitioner deprived of due process by the unilateral termination of temporary benefits by the self-insurer's insurance carrier?" (559 P.2d at 689)¹

It is submitted that this is the only legitimate question which could be considered by the United States Supreme Court, if the Petition for Certiorari were granted.

STATEMENT OF THE CASE

I. The Arizona Workmen's Compensation Law.

An employee who sustains an industrial injury in Arizona is entitled to benefits under the Workmen's Compensation Law unless the employee has elected to reject the statutory benefits and retain the right to sue his employer. *A.R.S.* §§ 23-906 and 23-1022; *Kilpatrick v. Superior Court*, 105 Ariz. 413, 466 P.2d 18 (1970).

Under the Workmen's Compensation Law, an employee who sustains an injury by accident in the course of employ-

1. The Salt River Project is authorized to provide workmen's compensation benefits directly to employees as a self-insurer pursuant to *A.R.S.* §§ 23-1061 and 23-1070. The "insurance carrier" referred to by the Court is actually an administrator of the Salt River Project workmen's compensation claims, Swett & Crawford, acting as agent for the Salt River Project.

ment is entitled to both compensation and medical benefits. *A.R.S.* § 23-1021. So long as an employee is temporarily disabled, reasonably necessary medical, surgical and hospital care for the injury must be provided. *A.R.S.* § 23-1062A.

Temporary compensation is paid according to the ability of the employee to work following an injury while receiving active medical care to improve his condition. When temporarily totally disabled, an employee is entitled to 65% of his average monthly wage. *A.R.S.* § 23-1045A. When an employee is able to engage in any employment, but remains under medical care, compensation is payable at the rate of 65% of the difference between the average monthly wage at the time of injury, and the amount the person is able to earn thereafter. *A.R.S.* § 23-1044A.

An injured employee's right to temporary compensation and medical care ceases when the employee's condition is medically stationary.² *A.R.S.* § 23-1044F; *Home Insurance Company v. Industrial Commission*, 23 Ariz.App. 90, 530 P.2d 1123 (1975). An employee who has sustained a permanent impairment of function as the result of an industrial injury may then be entitled to permanent disability compensation equal to 55% of the amount by which the employee's earning capacity is reduced. *A.R.S.* § 23-1044 C and D.

The Workmen's Compensation Law in Arizona contemplates that a self-insured employer "shall process and pay compensation and provide medical, surgical and hospital benefits, without the necessity for the making of an award

2. An employee's condition is medically stationary when his condition ceases to improve and there is no further medical or surgical treatment which will minimize his disability. See: *Employers Mut. Liability Ins. Co. of Wisconsin v. Contreras*, 109 Ariz. 383, 509 P.2d 1030 (1973); *Aragon v. Industrial Commission*, 14 Ariz. App. 175, 481 P.2d 545 (1971).

or determination by the commission." *A.R.S.* § 23-1061G; *Holmes Tuttle Broadway Ford v. Industrial Commission*, 27 Ariz.App. 128, 551 P.2d 577 (1976). There are certain exceptions to this general provision of the statute, particularly in the case of a permanent partial disability where only the Commission can establish and terminate the liability for payment of benefits. *A.R.S.* § 23-1047A; *Harbor Insurance Company v. Industrial Commission*, 24 Ariz.App. 197, 537 P.2d 34 (1975).

The Commission also exercises exclusive jurisdiction to adjudicate any questions which arise under the Workmen's Compensation Law. *S. H. Kress & Co. v. Superior Court*, 66 Ariz. 67, 182 P.2d 931 (1947); *Industrial Commission v. Superior Court*, 5 Ariz.App. 100, 423 P.2d 375 (1967). The Commission's adjudicatory function is specifically established by *A.R.S.* § 23-921A, and the procedures employed by the Commission for conducting hearings concerning compensation claims are prescribed by *A.R.S.* § 23-941 et seq.

Under this statutory system, a decision which is made by a self-insurer becomes binding upon an employee if the employee does not request a hearing before the Commission within 60 days of the issuance of the notice affecting the employee's rights to benefits. *A.R.S.* § 23-947; Cf. *Nelson v. Industrial Commission*, No. 1 CA-IC 1573, Division One, Arizona Court of Appeals, decided April 19, 1977. A decision by the Commission concerning any matter about which it is required to make an initial determination becomes res judicata if no request for hearing is made by one of the parties to the claim. *Mills v. Industrial Commission*, 23 Ariz.App. 28, 530 P.2d 385 (1975).

A party is entitled as a matter of right to a hearing when a request is filed with the Commission. *White v. Industrial*

Commission, 7 Ariz.App. 243, 437 P.2d 995 (1968). Any party dissatisfied with a Commission decision following a hearing is entitled to have the decision reviewed by the Arizona Court of Appeals. *A.R.S.* § 23-951A.

II. The Sandoval Injury and Compensation Claim.

Ausbert Sandoval was injured on September 7, 1971, while employed by the Salt River Project. A timely claim was filed for benefits under the Arizona Workmen's Compensation Law, and the claim was accepted. Medical, surgical and hospital benefits were provided, and the self-insured employer made an initial determination of Sandoval's average monthly wage and commenced the payment of total temporary compensation benefits as required by *A.R.S.* §§ 23-1041 and 23-1061F.

On November 15, 1971, the Commission also made an independent determination of Sandoval's average monthly wage at the time of injury in accordance with *A.R.S.* § 23-1061F.

On April 20, 1972, Sandoval retained his present counsel. However, no objection or request for hearing was made concerning the amount of Sandoval's average monthly wage until January 24, 1973—14 months and 9 days after the Commission had made the wage determination. A hearing was held by the Commission, resulting in a decision that the average monthly wage determination was *res judicata*, and that the Commission lacked jurisdiction to reconsider the matter.

Sandoval then took his case to the Arizona Court of Appeals. Under the then-prevailing law of Arizona, Sandoval's action divested the Commission of all jurisdiction to consider any questions relating to the Sandoval case. *Terrell v. Industrial Commission*, 21 Ariz.App. 139, 517 P.2d 97 (1973); *Greer v. Industrial Commission*, 20 Ariz.App. 559, 514 P.2d 512 (1973).

While Sandoval's case was before the Court of Appeals, Sandoval returned to work in a clerical job with the Salt River Project, and his compensation benefits were accordingly reduced under *A.R.S.* § 23-1044A. And, in August of 1973, Sandoval was discharged from active medical care by his attending orthopedic physician, and his condition was determined to be medically stationary.

In accordance with *A.R.S.* § 23-1047, the self-insured employer then notified Sandoval and the Commission of the termination of temporary disability benefits, advised the Commission that Sandoval had sustained a permanent partial disability as a result of his industrial injury, and requested the Commission to determine the amount, if any, of permanent partial disability compensation to be paid pursuant to *A.R.S.* § 23-1044C.

Sandoval's counsel objected to the termination of temporary benefits, and requested the Commission to conduct a hearing. The Chief Counsel for the Industrial Commission advised Sandoval's counsel that the Commission lacked jurisdiction to take action so long as Sandoval was pursuing his claim in the Court of Appeals.

On April 16, 1974, the Arizona Court of Appeals ruled that the Commission could continue the adjudication of disputes in a compensation case even though the validity of an average monthly wage determination had been taken to the Court of Appeals. *Castillo v. Industrial Commission*, 21 Ariz. App. 465, 520 P.2d 1142 (1974). The decision cleared the way for the Commission to consider the objections which had been made by Sandoval to the termination of temporary disability benefits in his case. However, Sandoval's counsel took no action of any kind to have the matter brought to hearing before the Commission.

On December 3, 1974, the Arizona Court of Appeals issued a Memorandum Decision in No. 1 CA-IC 1044, *Sandoval v. Industrial Commission*, affirming the determination made by the Commission of Sandoval's average monthly wage. The matter was remanded to the Commission, and two hearings were held concerning the validity of the termination of Sandoval's temporary disability benefits as of August, 1973.

Following the hearings, the Commission entered a decision on October 23, 1975, finding that Sandoval's condition had become medically stationary in August of 1973, and that temporary disability benefits had been properly terminated. (Appendix A) Sandoval's counsel then took this case to the Arizona Court of Appeals for the second time.

The Commission then refused to make a determination of the amount of permanent partial disability benefits to which Sandoval might be entitled, since such benefits would not be payable until it was finally established by appellate proceedings that temporary disability benefits had been properly terminated. However, the self-insured employer began to make voluntary payments of advanced permanent disability compensation under *A.R.S. § 23-1047A* while the case was being processed for the second time in the Court of Appeals. Those payments are continuing through the present proceedings.

On December 9, 1976, Division One of the Court of Appeals of Arizona affirmed the Commission Decision of October 23, 1975. (Pet. A-5) *Sandoval v. Industrial Commission*, Ariz.App., 559 P.2d 688 (1976). The Supreme Court of Arizona denied review of the case on February 1, 1977.

The case was again remanded to the Commission, and Sandoval's counsel immediately requested a prompt deter-

mination of the amount of permanent partial disability benefits to which Sandoval might be entitled. That determination was made by the Commission on March 29, 1977. When, for the first time in nearly six years of litigation the self-insurer requested a hearing concerning the amount of permanent disability benefits awarded by the Commission, Sandoval's counsel sought further appellate review by his Petition for a Writ of Certiorari filed in this Court on April 28, 1977.³ Whether the Petition for a Writ of Certiorari by Sandoval's counsel will further delay a final determination of Sandoval's rights to benefits has not been decided by the Commission at the time this brief is being prepared.

SUMMARY OF THE ARGUMENT

I.

Under the Arizona Workmen's Compensation Law, an employee may retain his right to sue an employer at common law for injuries sustained in an industrial accident, or elect to accept the compensation and medical benefits provided by the statute. Sandoval, by not rejecting the Workmen's Compensation Law, by having accepted statutory benefits for more than two years, and by having made no objection to the Constitutionality of the statute for more than three and one-half years after his injury, is estopped to now assert that the statute is invalid, and has waived any right to question the Constitutionality of the procedures by which benefits have been and are provided

3. How the Petitioner can now properly include in the record before this Court those documents filed with the Commission after appellate proceedings were terminated in Arizona (Pet. A-3 and A-4), and how the Petitioner can legitimately complain about events which have transpired since the case was remanded to the Commission is completely mystifying. (Pet. 12-13)

to him. *Booth Fisheries Co. v. Industrial Commission*, 271 U.S. 208, 70 L.Ed. 908, 46 S.Ct. 491 (1926).

II.

Many of the contentions made by the Petitioner involve matters which are now completely moot and of only limited historical interest in the State of Arizona. The Court has no reason to concern itself with the validity of a form no longer in use, with the sufficiency of the service of a notice which did not prejudice the Petitioner's rights, or with delays in adjudicating the Petitioner's benefits under a jurisdictional system which no longer exists in Arizona.

III.

The delays in the adjudication of the Sandoval claim for compensation have not been caused by deficiencies in the Workmen's Compensation Law, by acts of the Commission, or by the Salt River Project. The delays have been the direct result of Sandoval's resorting to appellate proceedings which have suspended determinations made of Sandoval's benefits, and made further determinations concerning additional benefits impossible. The deprivations complained of in this matter are not the result of any statute or governmental action. They are the result of the Petitioner's own efforts.

IV.

The costs of compensation and medical care provided under the Arizona Workmen's Compensation Law are borne entirely by employers and insurers, and not by public funds. Disputes over benefits are civil controversies which are resolved by private litigation.

The principles of Due Process which are applicable in this circumstance are no different from those which apply to civil suits. And, an employer or insurer with a property interest at stake in the adjudication of a compensation claim has a right to Due Process which is no less significant than similar rights to which an employee is entitled.

The Petitioner's contentions that he would be entitled to receive compensation benefits after his physical condition became medically stationary, and before a "prior adversary hearing" could be conducted, would impose liabilities without a hearing upon the self-insured employer for the payment of amounts not permitted by the law, thus depriving the employer of property without Due Process, and creating a substantive right to property in favor of the Petitioner in the guise of granting procedural Due Process.

V.

The Petitioner has not demonstrated that the procedures for the granting, termination and adjudication of workmen's compensation cases in Arizona deprive employees of Due Process, or that the Workmen's Compensation Law is otherwise violative of any provision of the United States Constitution as currently interpreted and applied.

ARGUMENT

Introduction

This Respondent has never conceded that the right of an employee to receive workmen's compensation benefits is "property" within the protection of the Fourteenth Amendment to the United States Constitution. On the contrary, *United Mine Workers of America v. Industrial Commission*, 374 F.Supp. 1294 (E.D.Va. 1974), indicated that the procedures by which such benefits are made available

to injured employees are not subject to judicial scrutiny to determine if there is compliance with the Fourteenth Amendment.

The Arizona Court of Appeals approached the Constitutional aspects of the instant case by *assuming* that an employee has a property interest in the continued payment of temporary benefits under the Workmen's Compensation Law, and that when objection is made to termination of those benefits, "some form of hearing is required." (559 P.2d at 691-692) While this Respondent does not necessarily concur with that conclusion, it will be assumed for purposes of the following Argument that there may be a theoretical basis upon which the United States Supreme Court could inquire into the statutory scheme by which such benefits are provided.

I. The Petitioner Is Estopped to Assert, and Has Waived Any Right to Question the Validity of the Arizona Workmen's Compensation Law.

As previously noted, the Arizona Workmen's Compensation Law provides an elective remedy to an employee who sustains an industrial injury. If the employee decides prior to injury to retain the common law right to sue an employer, the employee is entitled to reject the benefits provided by statute. If the employee does not reject statutory benefits, he cannot sue his employer for an industrial injury, and is entitled to receive only the compensation and medical benefits specified by statute. *A.R.S.* §§ 23-906 and 23-1022.

The Petitioner in this matter did not reject the rights afforded by the Workmen's Compensation Law, and accepted compensation and medical benefits provided by the self-insured employer.

It has long been axiomatic that a litigant cannot accept and retain the benefits of a statute and simultaneously contend that the statute is invalid. *Buck v. Kuykendall*, 267 U.S. 307, 69 L.Ed. 623, 45 S.Ct. 326 (1925). This principle has been applied to exactly the same type of attack upon the validity of a workmen's compensation system as in the instant case.

Booth Fisheries Co. v. Industrial Commission, 271 U.S. 208, 70 L.Ed. 908, 46 S.Ct. 491 (1926), held that an employer who had accepted the benefits afforded by the elective statute for providing workmen's compensation in Wisconsin could not assert that the procedures specified in the statute deprived the employer of any rights under the Fourteenth Amendment. At least four other reported decisions have reached the same conclusion in cases involving both employers and employees who have attacked the Constitutionality of the procedures by which compensation has been provided under elective systems. *Slick v. Hamaker*, 28 F.2d 103 (C.A. 8 1928); *Ison v. Western Vegetable Distributors*, 48 Ariz. 104, 59 P.2d 649 (1936); *Flanigan v. Reo Motors, Inc.*, 300 Mich. 359, 1 N.W.2d 572 (1942); *Senters v. Wright & Lopez, Inc.*, 220 Ga. 611, 140 S.E.2d 904 (1965).

The Petitioner sought and accepted workmen's compensation from his employer following his injury. Those benefits were unilaterally reduced, without objection by Sandoval, when he returned to work in a clerical position with the Salt River Project on January 3, 1973. In addition to earnings after his return to work, Sandoval has been paid tax-free temporary compensation of \$9,505.61 for the period from September 7, 1971, through August 24, 1973, and over \$17,000.00 has been expended for his medical care, all without any question being raised concerning the uni-

lateral decisions made by the self-insured employer in the administration of Sandoval's claim under A.R.S. § 23-1061G.

It was not until June 3, 1975, nearly four years after Sandoval was injured, that his counsel first purported to raise anything resembling a Constitutional question:

"We feel that to allow this to happen without an opportunity by the claimant to get immediate redress has happened in this particular case where it has gone on now for almost two years, is violative of the claimant's Constitutional rights where he may not be able to get compensation to which he is entitled." (Transcript of Hearing before Industrial Commission of Arizona, June 3, 1975, p. 44)

This attempt at the presentation of a Due Process issue was inadequate, untimely, and wholly unwarranted in view of the Petitioner's long-standing acceptance of the benefits of the Arizona Workmen's Compensation Law and the procedures under which the law required such benefits to be made available.

II. The Court Should Disregard Moot Issues.

It is well established that the Court will not render an advisory opinion or consider a moot question. *Fay v. Noia*, 372 U.S. 291, 9 L.Ed.2d 837, 83 S.Ct. 822 (1963). The Sandoval contentions involve matters which are to a large extent no longer of significance to either the Petitioner or other employees seeking workmen's compensation in Arizona.

Sandoval has been preoccupied throughout this litigation with the form (Pet. A-1) which was used to terminate temporary compensation on August 31, 1973, claiming that it (a) was not immediately served upon the Petitioner's attor-

ney (Pet. 9), and (b) contained "false" reasons for the termination of temporary benefits. (Pet. 6, 12)

The Petitioner neglects to mention that the notice of claim status was properly served upon Sandoval himself when it was issued, and that the delay in serving the notice upon Sandoval's counsel did not prejudice Sandoval's right to a hearing. (559 P.2d at 691) So much for any question concerning the sufficiency of notice. (Pet. 22)

Further, the printed portion of the form containing the "false" reason for the termination of benefits did not mislead the Petitioner or his counsel. (559 P.2d at 690) And, the form is no longer in use by the Commission. (559 P.2d at 689, note 1) The printed portion to which Petitioner objects is of only limited historical interest.

Admittedly, there was a delay in holding the initial hearing following the issuance of the notice of August 31, 1973. However, the decision of April 16, 1974, in *Castillo v. Industrial Commission*, supra, established that the Commission could determine rights to compensation while a case was pending in the Court of Appeals for decision of a different issue. *Castillo* cleared the way for an adjudication of the Sandoval Request for Hearing—an opportunity which Sandoval did not pursue—and eliminated any future problems of delay by approving the simultaneous exercise of jurisdiction by the Court of Appeals and the Commission to adjudicate different questions in the same case.

Thus, the Petitioner's claims of denial of Due Process which relate to the form of the notice issued on August 31, 1973, to the sufficiency of service of that notice, and to the refusal of the Commission to immediately grant a hearing with respect to that notice present moot questions which should be disregarded.

III. Any Delays in Adjudicating the Petitioner's Rights to Compensation Have Been Caused Solely by the Petitioner.

Due Process is satisfied if a party has a reasonable notice of action involving his rights, and an opportunity to be heard and to present his claim. But, Due Process does not require that the State of Arizona afford anyone in a civil controversy a particular type of trial or a right of appeal. *Dohany v. Rogers*, 281 U.S. 362, 74 L.Ed. 904, 50 S.Ct. 299 (1930).

Sandoval contends that he was deprived of compensation for three and one-half years without any procedural remedy being available to him. (Pet. 17) The delay complained of was the direct result of Sandoval's exercising a privilege granted by the State of Arizona to obtain appellate review of Commission decisions, and not the result of any action by the Commission or the Salt River Project.

The initial delay in adjudicating the termination of Sandoval's temporary compensation after August of 1973 was occasioned by Sandoval's having previously invoked the jurisdiction of the Arizona Court of Appeals. When *Castillo v. Industrial Commission*, supra, held in April of 1974 that the Commission had jurisdiction to adjudicate the Petitioner's pending objection to that termination of benefits, Sandoval did not seek a hearing.

And, after hearings were held and the Commission ruled that Sandoval's temporary compensation had been properly ended in 1973 (Appendix A), the Petitioner again exercised his privilege of appellate review and prevented the Commission from making any determination of his rights to permanent disability compensation.

The problem created by Sandoval's repeated trips to the Arizona appellate tribunals, and to this Court, is twofold. First, the determination that Sandoval's condition had be-

come medically stationary was suspended, and the Petitioner's rights to continued temporary compensation remained in dispute. (559 P.2d at 690) Second, the Commission's authority to adjudicate Sandoval's rights to permanent disability benefits was similarly frustrated, since such rights do not come into existence until temporary disability ends. *Home Insurance Company v. Industrial Commission*, supra.

So long as the Petitioner continues to assert that his rights to temporary compensation were never properly terminated—a claim which he has never supported with medical evidence or other factual data—his rights to permanent compensation cannot be finally determined. The Commission is not depriving Sandoval of either temporary or permanent disability benefits. Sandoval is depriving the Commission of authority to adjudicate those benefits. When this litigation ends, that "deprivation" will cease.

IV. The Petitioner Raises Questions of Private Rights to Due Process in Civil Proceedings, Not Matters of Substantial Federal Interest.

The Petitioner attempts to equate the statutory right to workmen's compensation with the right to receive welfare or similar benefits, relying primarily upon *Goldberg v. Kelly*, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 2018 (1970), as authority for the argument that benefits could not be properly terminated without a prior adversary hearing. The basic fallacy of this contention is that workmen's compensation is not analagous to any form of public assistance.

The purpose of the Arizona Workmen's Compensation Law is to eliminate to the extent possible any litigation between employers and employees in cases of industrial injuries, and to place the burden upon industry for compensating those who sustain injuries as a result of their employ-

ment, regardless of fault. *Pressley v. Industrial Commission*, 73 Ariz. 22, 236 P.2d 1011 (1951); *Red Rover Copper Co. v. Industrial Commission*, 58 Ariz. 203, 118 P.2d 1102 (1941). Under this system, the responsibility for the payment of compensation and medical care is imposed upon employers. *Culver v. Industrial Commission*, 23 Ariz.App. 540, 534 P.2d 754 (1975). Employers are required, in turn, to either insure the liability for benefits, or to provide the Commission with satisfactory proof of financial ability to pay benefits directly to employees and to act as self-insurers. *A.R.S.* § 23-961A. Benefits are not financed in any way with public funds.

What the Petitioner ignores, and what the Court must bear in mind, is that this system involves not just the claims of employees to benefits. It also involves the private property interests of employers and insurers who must pay those benefits, and who are also entitled to Due Process. The situation is essentially the same as that presented in civil litigation where the liability of the defendant may be in issue, or where the amount of damages may be the subject of a trial.

It is because the parties to a compensation case have equal and commensurate rights to Due Process that the theory of the Petitioner must be rejected. For if the Court were to give credence to the proposition that temporary compensation had to be paid until an adversary hearing could be held, the Court would have to adopt the correlative principle that an employer or insurer could be required to pay compensation to an employee beyond the time specified by law, i.e. the date the employee's condition became medically stationary, thus depriving the employer or insurer of property without Due Process.

This Respondent is not unaware of the dicta in *Dillard v. Industrial Commission*, 416 U.S. 783, 40 L.Ed.2d 540, 94 S.Ct. 2028 (1974), indicating that Due Process is required

in the termination of workmen's compensation benefits. However, *Dillard* does not have the compelling significance urged by the Petitioner (Pet. 15 et seq.) in this case, the Court having there ruled:

"We indicate no view on the question decided by the District Court—whether the suspension of benefits without notice and an adversary hearing denies due process of law, where the funds at issue are private, not public, where the State requires a finding of probable cause and other procedural safeguards short of a prior adversary hearing, and where a full hearing follows suspension of benefits by a period on the average of one month." (416 U.S. at 798)

If *Dillard* stands for anything in this matter, it is the principle that a workmen's compensation case involves the purely private property rights of all concerned. This Respondent submits that those rights are not of sufficient concern to be elevated to matters of substantial Federal interest under Rule 19 of this Court.

V. The Petitioner Has Not Demonstrated That He Has Been Deprived of Due Process.

If the Court will look behind the facade of quotations out of context and irrelevant facts which the Petitioner presents, it is apparent that the only real controversy in this case concerns *A.R.S.* § 23-1061G:

"Except as otherwise provided by law, the insurance carrier or self-insuring employer shall process and pay compensation and provide medical, surgical and hospital benefits, without the necessity for the making of an award or determination by the commission."

While the Petitioner has not cited this statute, or any other statute, it is the authority granted by *A.R.S.* § 23-1061G which has resulted in this case being brought to the United States Supreme Court.

The quoted provision is obviously not a delegation of legislative power such as was condemned in *Carter v. Carter Coal Company*, 298 U.S. 238, 80 L.Ed. 1160, 56 S.Ct. 855 (1936). The argument that *Carter* is somehow applicable to this case (Pet. 20) is totally specious. Nor is the statute a delegation of judicial authority which might affect Due Process. It is nothing more or less than a mandate to employers and insurers to pay benefits to employees without every aspect of a claim being the subject of official action by, or litigation before the Commission. The Petitioner has not demonstrated why a law to expedite the payment of benefits deprives anyone of Due Process.

Nor has the Petitioner explained why the Court should view the termination of compensation in this case in a different light than the termination of Social Security disability benefits without a prior adversary hearing, a procedure approved in *Matthews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976). The Arizona Court of Appeals, which with this case has reviewed 1,498 workmen's compensation matters in less than 12 years, and the Arizona Supreme Court, found no distinction. (559 P.2d 692)

There is a great temptation for this Respondent to embark upon a detailed explanation of the procedural safeguards which are provided for all parties under the Arizona Workmen's Compensation Law, and to argue the merits of the issues which the Petitioner is attempting to bring before the Court. The Respondent will yield to temptation only to note that employers and insurers do not exercise unbridled authority to act arbitrarily or capriciously in the administration of compensation claims.

A notice of a change in benefits issued by an insurer or employer must be accompanied by a supporting medical report from an employee's physician; and a notice which is not supported by such a report is absolutely void. *Rose-*

berry v. Industrial Commission, 113 Ariz. 66, 546 P.2d 802 (1976). Further, if it appears to the Commission at any time that an employee is not receiving those benefits which are due, the Commission may investigate the matter and hold a hearing within sixty days of the receipt of notice of the improper deprivation of compensation or medical care. A.R.S. § 23-1061J.

In *Anderson National Bank v. Lockett*, 321 U.S. 233, 88 L.Ed. 692, 64 S.Ct. 599 (1944), the Court stated:

"The fundamental requirement of due process is an opportunity to be heard upon such notice and such proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. If that is preserved, the demands of due process are fulfilled."

While the specific applications of the quoted principles have varied from case to case and time to time, the basic concepts have not changed. Nothing contained in the Petition for a Writ of Certiorari would indicate that those concepts have been violated in this case.

CONCLUSION

This brief has been extended to inordinate length by the need to explain to the Court the rights, benefits and procedures which are unique to the Arizona Workmen's Compensation Law. That explanation, and the constraints of Rule 24, have made it impractical for this Respondent to discuss every consideration which might be weighed by the Court in passing upon the instant Petition.

One matter not previously mentioned does require emphasis. The benefits and procedures specified by various workmen's compensation systems throughout the United States, and its possessions, are myriad. The subject is one of heterogeneous complexity involving millions of claims—

over 100,000 of which are made annually in the State of Arizona alone. Attempting to find a question of substantial Federal interest in a single aspect of a complex procedural system applicable in only one state is tantamount to a search for the proverbial needle in a haystack. The Petitioner is asking the Court to embark upon that expedition with neither magnet nor magnifying glass.

In the final analysis, the Court should remember that Ausbert Sandoval has not been deprived of any substantive benefits to which he has been or may be entitled. On the contrary, he seeks in this case to use Due Process not as a shield to protect a procedural right, but as a sword to gain compensation benefits in an amount greater than allowed by statute, and for a period of time during which benefits would not be payable by law. In effect, the Petitioner is asking the Court to consider amending the Arizona Workmen's Compensation Law so that it will provide him with benefits which do not now exist. It is submitted that the Court should not concern itself with such an effort to pervert the Fourteenth Amendment in order to obtain a private privilege.

The Respondent, Salt River Project, urges the Court to deny the Petition for a Writ of Certiorari submitted in this matter.

Respectfully submitted,

JOHN S. SCHAPER
215 East Lexington Avenue
Phoenix, Arizona 85012
*Attorney for Respondent,
Salt River Project
Agricultural Improvement
& Power District*

Appendix A

Before the Industrial Commission of Arizona

I.C.A. CLAIM No. 1/3 12-10

CARRIER CLAIM No. SP 71 185

Ausbert S. Sandoval,	Applicant,
vs.	
Salt River Agricultural Improvement and Power District,	Defendant Employer,
Salt River Agricultural Improvement and Power District, c/o Swett & Crawford,	Defendant Insurance Carrier.

DECISION UPON HEARING AND FINDINGS AND AWARD FOR TEMPORARY DISABILITY BENEFITS

The above applicant, then 31 year old lineman, suffered an industrial injury on September 7, 1971 during the course and scope of his employment with the above named defendant employer. His claim for workmen's compensation benefits was accepted and the average monthly wage established at \$883.28.

On August 31, 1973 the defendant employer issued NOTICE OF CLAIM STATUS whereby compensation benefits were terminated effective August 8, 1973 and medical benefits terminated effective August 24, 1973; said Notice also found the applicant had been discharged with a permanent disability. On the same day the defendant employer issued NOTICE OF PERMANENT DISABILITY AND REQUEST FOR DETERMINATION OF BENEFITS, whereby it was found the applicant had sustained an unscheduled permanent partial disability.

In protest of the foregoing action the applicant by and through his counsel filed a REQUEST FOR HEARING and pursuant thereto formal hearings were held in Phoenix, Arizona on June 3, 1975 and on September 23, 1975. The applicant is represented by Mr. Calvin C. Thur and Robert L. Hungerford, Jr.; the defendant employer was represented by Mr. John S. Schaper.

This Hearing Officer, having considered the file, records and all matters hereunto appertaining, now enters FINDINGS AND AWARD as follows:

FINDINGS

1. That the above named applicant sustained personal injury by accident arising out of and in the course of his employment with the above named employer on September 7, 1971.

2. That on said date the defendant employer had in service three or more workmen and thus was subject to the provisions of the Arizona Workmen's Compensation Law; that said defendant employer was insured against liability for the payment of compensation and accident benefits under said law, being a self-insured employer.

3. That applicant's average monthly wage at the time of said injury was \$883.28.

4. By report dated August 14, 1973 William C. Brainard, M.D. reported that in his opinion the applicant's condition was stationary with regard to the injuries he had sustained as a result of the industrial episode of September 7, 1971; at the formal hearing Dr. Brainard iterated his opinion as set forth in this report.

5. On April 10, 1975 the applicant was examined in group consultation at the Southwest Disability Evaluation Center by Sidney L. Stovall, M.D., Alfred F. Miller, M.D.,

Richard R. Van Epps, M.D. and Walter V. Edwards, M.D. This Board reported that there was no evidence the applicant had any increased impairment over the previous estimate of 20% permanent impairment of the whole man; the Board was also of the opinion that the applicant was not in need of active medical treatment at that time.

6. In workmen's compensation proceedings the injured employee always has the burden of proving by a reasonable preponderance of the evidence all the essential elements of his claim. *Brown v. Industrial Commission*, 20 Ariz. App. 486, 513 P. 2d 1369 (1973); *Continental Casualty Company v. Industrial Commission*, 15 Ariz. App. 565, 489 P. 2d 1267 (1971); *Darst v. Industrial Commission*, 13 Ariz. App. 587, 480 P. 2d 8 (1971). Furthermore, if the result of the industrial accident is not one that is thoroughly apparent to a layman, the physical condition of the injured employee and the causal relationship of the accident to such condition, as well as the need for medical treatment, can only be determined by expert medical testimony. *Wheeler v. Industrial Commission*, 94 Ariz. 199, 382 P.2d 675 (1963); *Spears v. Industrial Commission*, 20 Ariz. App. 406, 513 P. 2d 695 (1973); *Benavides v. Industrial Commission*, 19 Ariz. App. 467, 508 P. 2d 354 (1973).

7. That said applicant offered no medical testimony to prove that he still needed medical care at the time he was discharged by Dr. Brainard; accordingly, this Hearing Officer finds the applicant has failed to sustain his burden of proof herein.

8. That since the enactment of the Workmen's Compensation Law in Arizona, disability compensation benefits have been paid under a three-stage compensation plan: (1) temporary total benefits; (2) temporary partial benefits, and (3) permanent partial benefits, if indicated.

9. Temporary total disability compensation is paid from the moment of injury until the worker is able to resume either light or regular work; temporary partial compensation is paid from the moment the worker is able to resume work, light or regular, until his physical condition becomes stationary; *A.R.S. Sec. 23-1044. Minton v. Industrial Commission*, 90 Ariz. 254, 367 P. 2d 274 (1961); *Hardware Mutual Casualty Company v. Industrial Commission*, 17 Ariz. App. 7, 494 P. 2d 1353 (1972).

10. That once an injured employee's condition is found to be medically stationary with a permanent impairment, he does not have an absolute right to continuation of payment of temporary partial disability compensation until evidence of a loss of wage is determined, and the refusal by the employer to continue such payment is not erroneous.

11. That determination of the applicant's right to compensation for permanent partial disability, i.e., loss in earning capacity, is the obligation of the Industrial Commission pursuant to *A.R.S. Sec. 23-1047 B*.

12. That the NOTICE OF CLAIM STATUS heretofore issued on August 31, 1973 by the defendant employer was correct and fully supported by the evidence, and this Hearing Officer finds no merit to the applicant's charge that said Notice was either erroneous or false. Furthermore, the authority of the employer to issue said Notice is specifically granted by the Workmen's Compensation Act. (See for example *A.R.S. Sec. 23-1061 G*).

13. That applicant's condition became medically stationary requiring no further treatment on August 24, 1973; accordingly, said applicant is entitled to medical, surgical and hospital benefits as provided by law from September 7, 1971 to August 24, 1973.

14. That said applicant is entitled to compensation for temporary total and/or temporary partial disability benefits as provided by law from September 7, 1971 to August 24, 1973.

15. That applicant's entitlement to compensation, if any, based upon his 20% general physical functional impairment shall hereafter be determined administratively by this Commission as required by and pursuant to *A.R.S. 23-1047 B*.

AWARD

The applicant is hereby awarded temporary disability compensation and medical benefits in accordance with the foregoing findings.

NOTICE: Any party dissatisfied with this Award may file a written request for review of the same with the Hearing Officer Division of The Industrial Commission within THIRTY (30) DAYS after the mailing of this Award as provided by *Arizona Revised Statutes, Secs. 23-942 D and 23-943 A and B* (1973). Unless such written request is made within the time provided, this Award is final.

s/ C. E. SINGER, JR.
C. E. Singer, Jr.
Hearing Officer.

Dated and mailed in Phoenix, Arizona
this 23rd day of October, 1975.